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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928 29

No. 687 36

THE CORN EXCHANGE BANK, APPELLANT,

vs.

BIRD S. COLER, COMMISSIONER OF PUBLIC WELFARE OF THE CITY OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED FEBRUARY 9, 1929

(33,996)

(33,996)

SUPREME COURT OF THE UNITED STATES

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 23, 1929

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IN COURT OF APPEALS OF NEW YORK

REMITTITUR—December 31, 1928

[fol. 2] BIRD S. COLER, Commissioner of Public Welfare of the City of New York, Respondent,

ag'st

THE CORN EXCHANGE BANK, Appellant

Be it remembered, That on the 8th day of November, in the year of our Lord one thousand nine hundred and twenty-eight, The Corn Exchange Bank, the appellant in this cause, came here unto the Court of Appeals, by Laughlin, Gerard, Bowers & Halpin, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the City Court of the City of New York. And Bird S. Coler, Commissioner of Public Welfare of the City of New York, the respondent in said cause, afterwards appeared in said Court of Appeals by George P. Nicholson, his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Frank C. Laughlin, of counsel for the appellant, and by Mr. Martin H. Murphy, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the City Court of the City of New York appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the [fols. 3 & 4] City Court of the City of New York, there to be proceeded upon according to law.

Therefore, It is considered that the said judgment be affirmed with costs, as aforesaid.

And hereupon, as well as the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the City Court of the City of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said City Court, before the Justices thereof, &c.

Wm. J. Armstrong, Clerk of the Court of Appeals of the State of New York.

Certificate to foregoing paper omitted in printing.

Court of Appeals

OF THE STATE OF NEW YORK. 1

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,
Plaintiff-Respondent,
—against—
THE CORN EXCHANGE BANK,
Defendant-Appellant.

Statement Under the Rule.

This case comes up for review by this Court, 2
pursuant to Article VI, Section 7 of the Constitution of the State of New York, and pursuant to Section 588, Sub. 3, C. P. A., and pursuant to Section 63 of the New York City Court Act.

This action was commenced by the service of a summons and complaint on the defendant dated June 27, 1927.

On motion of defendant, the complaint was dismissed.

On appeal by plaintiff to the Appellate Term, First Department, the order dismissing the complaint was reversed and judgment was directed in favor of plaintiff for the sum demanded in the 3
complaint.

Judgment was thereupon entered in the City Court of the City of New York, County of New York, and an order entered in said court making the judgment and order of the Appellate Term the judgment and order of the City Court.

This appeal is from said judgment and order.

There has been no change of parties or attorneys herein.

Notice of Appeal to Court of Appeals.

CITY COURT OF THE CITY OF NEW YORK,

NEW YORK COUNTY.

Index No. 23607—1927.

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,

Plaintiff,

—against—

THE CORN EXCHANGE BANK,

Defendant.

Sirs:

PLEASE TAKE NOTICE that the above named defendant hereby appeals to the Court of Appeals from the judgment in the above entitled action in favor of the plaintiff and against the defendant entered in the office of the Clerk of the City Court of the City of New York, New York County, on the 3rd day of October, 1928, in favor of the plaintiff and against the defendant for the sum of Two thousand two hundred eleven dollars and fifty cents ($2,211.50), and defendant also appeals from an order in the above entitled action made on the 2nd day of August, 1928, and entered in the office of the Clerk of the City Court of the City of New York, New York County, on the 3rd day of August, 1928, making the order and judgment of the Appellate Term, First Department, the order and judgment of the City Court of the City of New York, New York County, which order of said Appellate Term, First Department, reversed the judgment dismissing the complaint herein and directed judgment in favor of the plain-

tiff for the sum demanded in the complaint. This 7
said appeal is taken pursuant to the provisions of Article VI, Section 7 of the Constitution of the State of New York and particularly subdivision 3 thereof, and pursuant to Section 63 of the New York City Court Act, and pursuant to Section 588 of the Civil Practice Act and particularly sub-division 3 thereof, upon the ground that the only question involved in this appeal is the validity of a statutory provision of the State under the Constitution of the State and of the United States, and upon this appeal the defendant presents only said constitutional question for consideration and determination by the Court of Ap- 8
peals, and defendant appeals from each and every part of said judgment and order and from the whole thereof.

Dated, New York, the 23rd day of October, 1928.

Yours, &c.,

LAUGHLIN, GERARD, POWERS & HALPIN,
Attorneys for Defendant,
Office and P. O. Address,
57 William Street,
Borough of Manhattan,
New York City. 9

To:

GEORGE P. NICHOLSON, ESQ.,
Corporation Counsel,
Attorney for Plaintiff,
Municipal Building,
New York City.

CLERK OF THE CITY COURT OF THE CITY OF NEW YORK.
County of New York.

Judgment Appealed From.

10

CITY COURT OF THE CITY OF NEW YORK,
NEW YORK COUNTY.

[SAME TITLE.]

The plaintiff in the above-entitled action having appealed to the Appellate Term of the Supreme Court, First Judicial Department, from the judgment herein, dated the 18th day of October, 1927, and entered and filed in the office of the Clerk
11 of the City Court of the City of New York, County of New York, on or about the same day, which said judgment dismissed the complaint herein, with the sum of $23.92 costs; and the said appeal having been duly argued at the said Appellate Term, and that Court having on the 26th day of June, 1928, made and entered an order whereby it ordered and adjudged that the judgment of the City Court of the City of New York, County of New York, is reversed with costs, and judgment directed in favor of the plaintiff for the amount claimed in the complaint; and the
12 costs of the plaintiff having been duly taxed at the sum of $181.50.

NOW, on motion of George P. Nicholson, corporation counsel, attorney for plaintiff, it is

ADJUDGED that the judgment of the City Court of the City of New York, County of New York, so appealed from herein, be and the same hereby is reversed, and that the plaintiff Bird S. Coler,

Commissioner of Public Welfare of the City of New York, recover of the defendant, the Corn Exchange Bank, the sum of $2,030 (being the amount deposited to the credit of Raffaele De Stefano, now in possession of the said Corn Exchange Bank, McKinley Square Branch, corner of 169th street and Clinton avenue, in the Borough of The Bronx, City of New York), together with the sum of $181.50, the amount of said plaintiff's costs as taxed, making a total sum of $2,211.50, and that said plaintiff have execution therefor.

Dated, New York, October 3, 1928.

HARRY C. PERRY,
Clerk.

Order Appealed From.

At a Special Term, Part II, of the City Court of the City of New York, held in and for the County of New York at the Court House thereof on the 2nd day of August, 1928.

Present—Hon. Joseph W. Keller, *Justice.*

[SAME TITLE.]

The plaintiff in the above entitled action having appealed to the Appellate Term of the Supreme Court, First Department, from the judg-

ment of the City Court of the City of New York, County of New York, dated and entered therein the 18th day of October, 1927, dismissing the complaint herein for the sum of $23.92 costs, and the said appeal having been duly argued at the said Appellate Term, and that Court having made and entered an order on the 26th day of June, 1928, reversing the judgment so appealed from with costs and directing judgment in favor of the plaintiff for the sum claimed in the complaint.

Now, upon reading and filing the said remittitur and on motion of George P. Nicholson, Corporation Counsel, attorney for plaintiff, it is

ORDERED AND ADJUDGED that the said order and judgment of the Appellate Term be and the same hereby is made the order and judgment of this Court.

Enter,

J. W. K.,
J. C. C.

REMITTITUR FROM APPELLATE TERM TO CITY COURT OF THE CITY OF NEW YORK.

NEW YORK SUPREME COURT,

APPELLATE TERM—FIRST DEPARTMENT.

REED S. COLE, Commissioner of Public Welfare of the City of New York,

Plaintiff-Appellant,

—against—

CORN EXCHANGE BANK,

Defendant-Respondent.

Statement Under Rule 234.

This action was commenced by the service of a summons and complaint on the defendant dated June 27, 1927.

Affidavit and notice of motion to dismiss the complaint was made by the defendant July 1, 1927.

The judgment appealed from, which granted the motion and dismissed the complaint with costs, was entered October 18, 1927.

Notice of appeal was served and filed October 21, 1927.

There has been no change of parties or attorneys herein.

16 ment of the City Court of the City of New York, County of New York, dated and entered therein the 16th day of October, 1929, dismissing the complaint herein for the sum of $22.92 costs, and the said appeal having been duly argued at the said Appellate Term, and this Court having made and entered an order on the 28th day of June, 1928, reversing the judgment so appealed from with costs and directing judgment in favor of the plaintiff for the sum claimed in the complaint.

Now, upon reading and filing the said remittitur and on motion of George P. Nicholson, Corporation Counsel, attorney for plaintiff, it is

17

Ordered and adjudged that the said order and judgment of the Appellate Term be and the same hereby is made the order and judgment of this Court.

Enter,

J. W. K.,
J. C. C.

18

REMITTITUR FROM APPELLATE TERM TO CITY COURT OF THE CITY OF NEW YORK.

19

NEW YORK SUPREME COURT,

APPELLATE TERM—FIRST DEPARTMENT.

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,

Plaintiff-Appellant,

—against—

CORN EXCHANGE BANK,

Defendant-Respondent.

20

Statement Under Rule 234.

This action was commenced by the service of a summons and complaint on the defendant dated June 27, 1927.

Affidavit and notice of motion to dismiss the complaint was made by the defendant July 7, 1927.

The judgment appealed from, which granted the motion and dismissed the complaint with costs, was entered October 18, 1927.

21

Notice of appeal was served and filed October 21, 1927.

There has been no change of parties or attorneys herein.

Notice of Appeal to the Appellate Term.

CITY COURT OF THE CITY OF NEW YORK,

NEW YORK COUNTY.

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,
Plaintiff-Appellant,

—against—

CORN EXCHANGE BANK,
Defendant-Respondent.

PLEASE TAKE NOTICE that the plaintiff-appellant, Bird S. Coler, as Commissioner of Public Welfare of the City of New York, hereby appeals to the Appellate Term of the Supreme Court, First Department, from a judgment of this Court entered in the office of the Clerk of the City Court of The City of New York, New York County, on the 18th day of October, 1927, rendering judgment dismissing the complaint in the above named action, and the said plaintiff-appellant hereby appeals from each and every part of the said judgment above referred to.

Dated, New York, October 20, 1927.

Yours &c.,

GEORGE P. NICHOLSON,
Corporation Counsel and
Attorney for Plaintiff-Appellant,
Municipal Building,
Borough of Manhattan,
New York City.

REMITTITUR.

Notice of Appeal to the Appellate Term. 25

To:

LAUGHLIN, GERARD, BOWERS & HALPIN, ESQS.,
Attorneys for Defendant-Respondent,
57 William Street,
Borough of Manhattan,
New York City.

HON. HARRY C. PERRY,
Clerk of the City Court of the
City of New York, New York County.

26

27

28 **Order Dismissing Complaint Being Order Appealed From.**

Index Number 23607—Year 1927.

CITY COURT OF THE CITY OF NEW YORK.

SPECIAL TERM.

Present—HON. EDWARD G. LA FETRA, *Justice.*

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,

29 Plaintiff,

—against—

CORN EXCHANGE BANK,

Defendant.

The following papers used on this motion argued this day.

	Papers Numbered
Notice of Motion and Affidavits Annexed	1-2
30 Answering Affidavits	5
Exhibits	3-4

Upon the foregoing papers this motion is granted and complaint dismissed with costs.

Dated October 11, 1927.

E. G. L.,
J. C. C.

REMITTITUR.

Judgment Appealed From. 31

CITY COURT OF THE CITY OF NEW YORK,

NEW YORK COUNTY.

Judgment 23607—1927.

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,

Plaintiff,

—against—

CORN EXCHANGE BANK, 32

Defendant.

The defendant in the above-entitled action having duly moved by notice of motion dated July 7, 1927, to dismiss the complaint herein, and said motion having duly and regularly come on for hearing before Mr. Justice Edward B. La Fetra at a Special Term, Part I, of this Court held on the 11th day of October, 1927, at the Court House in the Brownstone Building, City and County of New York, and the Court having heard Henry M. Carpenter, of counsel for the defendant, in support of said motion and Benjamin Millstein, of counsel for plaintiff in opposition thereto, and after due deliberation, having duly made and filed on the 13th day of October, 1927, an order granting defendant's motion to dismiss the complaint herein with costs, and defendant's costs having been duly adjusted at Twenty-three and 92/100 Dollars ($23.92). 33

REMITTITUR.

34 *Judgment Appealed From.*

Now, on motion of Laughlin, Gerard, Bowers & Halpin, attorneys for defendant, it is

ADJUDGED that the complaint of the plaintiff be, and the same hereby is dismissed, and that the defendant, The Corn Exchange Bank, recover of the plaintiff its costs of this action, as taxed, amounting to the sum of $23.92, and that it have execution therefor.

Judgment this 18th day of October, 1927.

35 HARRY C. PERRY,
Clerk.

36

13

REMITTITUR.

Summons. 37

CITY COURT OF THE CITY OF NEW YORK,

NEW YORK COUNTY.

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,

Plaintiff-Appellant,

—against—

CORN EXCHANGE BANK,

Defendant-Respondent. 38

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within six days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, New York, June 27, 1927. 39

GEORGE P. NICHOLSON,
Corporation Counsel,
Plaintiff's Attorney,
Office and Post Office Address,
Municipal Building,
Centre and Chambers Street,
Borough of Manhattan,
New York City.

40 **Complaint.**

CITY COURT OF THE CITY OF NEW YORK,
NEW YORK COUNTY.

[SAME TITLE.]

The above-named plaintiff, by this complaint, shows to this Court and alleges:

First: That at all the times hereinafter mentioned, the plaintiff was and is the Commissioner of Public Welfare of the City of New York.

41 Second: Upon information and belief that the above-named defendant is a domestic corporation organized and existing under and by virtue of the laws of the State of New York.

Third: Upon information and belief that the defendant has on deposit to the credit of Raffaele De Stefano the sum of Two thousand and thirty ($2,030) Dollars.

Fourth: Upon information and belief that Mary De Stefano is the wife of Raffaele De Stefano and that a child is the issue of said marriage and that the said Raffaele De Stefano abandoned his wife and infant child and absconded from the State of New York.

42

Fifth: Upon information and belief that on or about the 21st day of September, 1923, in accordance with Sections 921 and 922 of the Code of Criminal Procedure upon due proof that the said Raffaele De Stefano abandoned his wife and infant child, leaving them in danger of becoming a charge upon the public and absconded from the State of New York, a warrant of seizure was issued out of The Family Court, Borough of Manhattan, City of New York, by Hon. Louis B. Brodsky and

REMITTITUR.

Complaint.

Hon. Charles A. Oberwager, two City Magistrates of the City of New York, directing the said Bird S. Coler, Commissioner of Public Welfare of the City of New York, to take and seize all the right, title and interest of the said Raffaele De Stefano in and to the sum of Two thousand thirty ($2,030) Dollars, which is now in the possession of the defendant, and that said warrant directed Bird S. Coler, Commissioner of Public Welfare of the City of New York, to make an inventory of the property seized and return the same to the Court of General Sessions the County of New York. 43 44

Sixth: Upon information and belief that on or about the 22nd day of September, 1926, said warrant of seizure was served on the defendant, The Corn Exchange Bank, and the said defendant, The Corn Exchange Bank, has refused to deliver to the said Bird S. Coler, Commissioner of Public Welfare of the City of New York, as directed in the said warrant of seizure, the sum of Two thousand and thirty ($2,030) Dollars as requested so to do, a copy of the said warrant being hereto annexed and made part of the complaint and marked "Plaintiff's Exhibit A". 45

WHEREFORE, plaintiff demands judgment against the defendant, The Corn Exchange Bank, for the sum of Two thousand and thirty ($2,030) Dollars, together with the costs of this action.

GEORGE P. NICHOLSON,
Corporation Counsel,
Office and Post Office Address,
Room 1500, Municipal Building,
Chambers & Centre Street,
Borough of Manhattan,
New York City.

REMITTITUR.

46 COMPLAINT.

PLAINTIFF'S EXHIBIT "A".

CITY MAGISTRATES' COURT OF THE CITY OF NEW YORK.

BIRD S. COLER, Commissioner of Public Welfare of the City of New York, on the complaint of Marie De Stefano,

Complainant,

—against—

47

RAFFAELE DE STEFANO,

Defendant.

County of New York—ss.:

To the Commissioner of Public Welfare of the City of New York:

It appearing to us two City Magistrates of the City of New York, upon application made to us by BIRD S. COLER, Commissioner of Public Welfare
48 of the City of New York, and upon due proof of the facts before us, that Raffaele De Stefano, the above named defendant, abandoned his wife and one minor child in the City of New York, leaving them without adequate support and in danger of becoming a burden upon the public, and absconded, and the said wife is now likely to become a charge upon the public.

REMITTITUR.

Plaintiff's Exhibit A.

WE, THEREFORE, AUTHORIZE YOU, the said Commissioner of Public Welfare of the City of New York, to take and seize all the right, title and interest of Raffaele De Stefano in and to the sum of Two thousand and thirty ($2,030.00) Dollars, or any part thereof, now in the possession of the Corn Exchange Bank of the City of New York, McKinley Square Branch at the corner of 169th Street and Clinton Avenue, in the Borough of the Bronx, City of New York, and that you immediately, upon such seizure, make an inventory of the property taken, and return the same, together with these proceedings to the County Court, Bronx County, and have you then and there this warrant.

GIVEN under our hands and seals, in the Borough of the Bronx, City of New York, on the 21st day of September, 1926.

LOUIS B. BRODSKY,
City Magistrate of the
City of New York.

CHARLES A. OBERWAGER,
City Magistrate of the
City of New York.

52 **Notice of Motion Read on Behalf of Defendant.**

[SAME TITLE.]

Sir:

PLEASE TAKE NOTICE that upon the summons and complaint in the above-entitled action and the exhibit annexed thereto and upon the affidavit of Henry M. Carpenter, verified the 7th day of July, 1927, and the exhibit annexed thereto, and upon all
53 the papers and proceedings herein, the undersigned will move this Court at Special Term, Part I, thereof, to be held at the Courthouse in the Brownstone Building, No. 32 Chambers Street, Borough of Manhattan, City of New York, on the 12th day of July, 1927, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, to dismiss the complaint herein upon the following grounds:

1. That there is a non-joinder of and defect of parties plaintiff, in that Raffaele De Stefano, mentioned in the complaint, has an interest in the
54 cause of action alleged in the complaint and in the fund referred to therein and is a necessary party to the proper and complete determination of the action and he has not been made a party thereto or served with any process therein.

2. That the complaint fails to set forth facts sufficient to constitute a cause of action.

3. That the complaint fails to set forth facts sufficient to constitute a cause of action, in that Sections 921 and 922 of the Code of Criminal Pro-

cedure, referred to in the complaint, are unconstitutional under the Constitution of the State of New York, and particularly Section 6 thereof, and the Constitution of the United States, and particularly the Fourteenth Amendment thereto, in that said sections of the Code of Criminal Procedure attempt to deprive persons, including the defendant and its depositor Raffaele De Stefano, of property without due process of law. 55

4. That said complaint shows upon its face, and it appears from the annexed affidavits and exhibits, that no notice of the proceedings upon which the warrant referred to in the complaint was based, was given to the defendant or its depositor Raffaele De Stefano, either constructively or otherwise, and no process of any kind in the aforesaid proceedings was served upon either the defendant or its depositor, the said Raffaele De Stefano, and the complaint therefore fails to state facts sufficient to constitute a cause of action, and it therefore appears that the plaintiff has no cause of action against the defendant. 56

5. That the plaintiff herein has no legal capacity to sue and has no title or interest in the fund referred to in the complaint, and this Court has no jurisdiction of the subject of the action, because, for the reasons before mentioned, the plaintiff derives whatever capacity or interest he has from Sections 921 and 922 of the Code of Civil Procedure and the plaintiff has no legal capacity to sue or interest in the fund referred to in the complaint because the said sections are unconstitutional. 57

58 *Notice of Motion.*

AND PLEASE TAKE FURTHER NOTICE that the defendant will move for such other and further relief in the premises as to the Court may seem just and proper.

Dated July 7, 1927.

Yours, etc.,

LAUGHLIN, GERARD, BOWERS & HALPIN,
Attorneys for Defendant,
Office & P. O. Address,
59 57 William Street,
Borough of Manhattan,
New York City.

To:
HON. GEORGE P. NICHOLSON,
Corporation Counsel,
Attorney for Plaintiff,
Municipal Building,
Borough of Manhattan,
New York City.

60

REMITTITUR.

Affidavit of Henry M. Carpenter Read on Behalf of Defendant. 61

[SAME TITLE.]

State of New York,
County of New York—ss.:

HENRY M. CARPENTER, being duly sworn, deposes and says that he is an attorney-at-law and associated with Messrs. Laughlin, Gerard, Bowers & Halpin, attorneys for the defendant in the above-entitled action, and that he has charge of the same and is familiar therewith. 62

That the complaint herein was not served personally upon the defendant, but the attorneys for the defendant duly served a notice of appearance for the defendant upon the Corporation Counsel on the 7th day of July, 1927, and have not answered the complaint herein or taken any other action with respect thereto than the making of this motion.

That, upon information and belief, neither the defendant herein nor Raffaele De Stefano were made parties to the proceedings in the Magistrate's Court, referred to in the complaint herein, or had notice thereof, either constructively or otherwise, or appeared therein. That no process or other notice of any kind whatsoever in the said proceedings in the Magistrate's Court or in this Court in this action were served upon the defendant or the said Raffaele De Stefano other than the complaint herein and copy of warrant which were servd upon the defendant herein. 63

64 *Affidavit of Henry M. Carpenter.*

That the forregoing allegations are based upon conversations with officers and employees of the defendant and upon the affidavit of Christopher J. Dunn, verified the 17th day of September, 1926, and the affidavit of Marie De Stefano, verified the 17th day of September, 1926, annexed to the moving papers herein, and upon the ground that it nowhere appears in the complaint herein or in the papers and proceedings in the Magistrate's Court that any such notice was given.

65 WHEREFORE, deponent requests that, for the reasons set forth in the notice of motion annexed hereto, the complaint herein be dismissed.

Sworn to by Henry M. Carpenter, July 7, 1927.

66

REMITTITUR.

EXHIBIT ANNEXED TO AFFIDAVIT OF HENRY M. CARPENTER. 67

DOMESTIC RELATIONS COURT,

BOROUGH OF BRONX.

CITY OF NEW YORK,

Plaintiff,

—against—

RAFFAELE DE STEFANO,

Defendant. 68

County of New York—ss.:

CHRISTOPHER J. DUNN respectfully shows to this Court and alleges:

First: That he is the Deputy and Acting Commissioner of Public Welfare of the City of New York.

Second: Upon information and belief derived from the affidavit of Marie De Stefano, hereto annexed, sworn to on the 17th day of September, 1926, petitioner alleges that Marie De Stefano is the wife of the defendant. 69

Third: Upon information and belief derived from the said affidavit of Marie De Stefano, hereto annexed, that on or after the 5th day of January, 1926, while said deponent and the defendant resided at Number 1150 Intervale Avenue, Borough

70 *Exhibit Annexed to Affidavit of H. M. Carpenter.*

of the Bronx, City of New York, the said defendant, Raffaele De Stefano, without justification, abandoned his wife and his infant child and absconded from the State of New York, leaving them without means and in danger of becoming charges upon the public.

Fourth: Upon information and belief derived from the affidavit of Marie De Stefano, hereto annexed, the defendant, Raffaele De Stefano, has in his own name a bank account in the Corn Exchange Bank of the City of New York, McKinley
71 Square Branch, at the corner of 169th Street and Clinton Avenue, in the Borough of the Bronx, City of New York, and that there is now due to the credit of the said account the sum of Two thousand thirty ($2,030.00) Dollars.

WHEREFORE, the petitioner prays that in accordance with Section 921 and 922 of the Code of Criminal Procedure and the following sections, a warrant may issue authorizing the Commissioner of Public Welfare of the City of New York to seize the said property of the defendant, to wit, the sum of Two thousand and thirty ($2,030.00) Dollars,
72 now on deposit to the credit of Raffaele De Stefano in the Corn Exchange Bank of the City of New York, McKinley Square Branch, at the corner of 169th Street and Clinton Avenue, in the Borough of the Bronx, City of New York, and requiring him to make an inventory of the property so seized and return it, together with this proceeding, at the next term of the Court of General Sessions in and for the County of Bronx, in order that the property so seized may be applied to the support and main-

Exhibit Annexed to Affidavit of H. M. Carpenter.

tenance of the said Marie De Stefano and his minor child, Leo De Stefano. 73

Dated, New York, September 17, 1926.

CHRISTOPHER J. DUNN,
Petitioner.

County of New York—ss.:

CHRISTOPHER J. DUNN, being duly sworn, deposes and says: That he is the petitioner above named; that he has read the foregoing petition and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. 74

CHRISTOPHER J. DUNN.

Sworn to before me this
17th day of September, 1926.

D. J. O'DAIR,
Notary Public,
New York County. 75

76 EXHIBIT ANNEXED TO AFFIDAVIT OF HENRY M. CARPENTER.

DOMESTIC RELATIONS COURT,
BOROUGH OF BRONX.

CITY OF NEW YORK,
Plaintiff,

—against—

RAFFAELE DE STEFANO,
Defendant.

77 County of New York—ss.:

MARIE DE STEFANO, being duly sworn, deposes and says:

First: That she is the wife of the above-named defendant, Raffaele De Stefano; that she is 54 years of age, and resides at Number 1142 Intervale Avenue, Borough of the Bronx, City of New York.

Second: That on or about the 5th day of January, 1926, while deponent and said defendant Raffaele De Stefano were residing at Number 1150 Intervale Avenue, Borough of Bronx, City of New
78 York, defendant Raffaele De Stefano, without justification abandoned deponent and his infant child and absconded from the State of New York, leaving them without means and in danger of becoming charges upon the public.

Third: That since that time defendant has contributed nothing towards the support of the deponent and his child; that the said child Leo De Stefano is the son of the defendant and is twelve years of age.

Fourth: That deponent further alleges the defendant Raffaele De Stefano has in his own name

Exhibit Annexed to Affidavit of H. M. Carpenter. 79

a bank account in the Corn Exchange Bank of the City of New York, McKinley Square Branch at the corner of 169th Street and Clinton Avenue in the Borough of the Bronx, City of New York, and that there is now due to the credit of said account the sum of Two thousand thirty ($2,030) Dollars.

Fifth: Deponent further alleges that she has no interest in any real estate, no stocks or bonds, no jewelry of any kind except the interest in the account above stated.

WHEREFORE, deponent prays that in accordance with Sections 921 and 922 of the Code of Criminal 80
Procedure and the following Sections a warrant may issue authorizing the Commissioner of Public Welfare of the City of New York, to seize the said property of the defendant, to wit.: The sum of Two thousand and thirty ($2,030) Dollars now on deposit in the said Corn Exchange Bank, McKinley Square Branch at the corner of 169th Street and Clinton Avenue in the Borough of the Bronx, City of New York, and require him to make an inventory of the property so seized and return it together with his proceedings at the next term of the Court of General Sessions in order that the 81
property so seized may be applied towards the maintenance of deponent and defendant's said child.

her
MARIE (X) DE STEFANO.
mark.

Sworn to before me, this 17th
day of September, 1926.

DAVID G. ZUCKER,
Commr. of Deeds,
N. Y. City.

82 **Affidavit of Charles D. Nutt, Read on Behalf of Defendant.**

CITY COURT OF THE CITY OF NEW YORK,

COUNTY OF NEW YORK.

[SAME TITLE.]

State of New York,
County of Bronx—ss.:

83 CHARLES D. NUTT, being duly sworn, deposes and says:

That he is Manager of the McKinley Square Branch of The Corn Exchange Bank, the defendant in the above-entitled action. That on ~~or~~ about the 21st day of September, 1927, your deponent received from Raffaele De Stefano, mentioned in the complaint in the above-entitled action, a letter apparently mailed from Cairo, Egypt, enclosing passbook of said Raffaele De Stefano, showing the deposit of Raffaele De Stefano with the defendant, and an order thereon to the order of
84 Cash in the sum of $2,000, which said order was signed by said Raffaele De Stefano. The said letter requests the transmission to Raffaele De Stefano of the sum of $2,000 out of his account, the said $2,000 to be sent to said Raffaele De Stefano at Cairo, Egypt.

(Sworn to by Charles D. Nutt, 27 September, 1927.)

REMITTITUR.

Affidavit of No Opinion.

State of New York,
County of New York—ss.:

BENJAMIN MILLSTEIN, being duly sworn, deposes and says that he is an Assistant Corporation Counsel of the City of New York, in charge of the foregoing action; that no written opinion or memorandum was handed down by the Special Term of the City Court, New York County, except the following by La Fetra, *J.*:

"Motion granted, and complaint dismissed with costs. Order filed."

BENJAMIN MILLSTEIN.

Sworn to before me this 1st
day of November, 1927.

I. ROBERT WOLFE,
Commissioner of Deeds,
New York City.

88 **Waiver of Certification.**

It is hereby stipulated that the foregoing are correct copies of the notice of appeal to the Appellate Term, the judgment appealed from and the judgment roll, except such parts as are omitted pursuant to Rule 234 of the Rules of Civil Practice all of which are now on file in the office of the Clerk of the City Court; and certification thereof pursuant to Sections 170 and 616 of the Civil Practice Act or otherwise is hereby waived.

Dated, New York, April 13, 1928.

89

GEORGE P. NICHOLSON,
Corporation Counsel,
Attorney for Plaintiff-Appellant.

LAUGHLIN, GERARD, BOWERS & HALPIN,
Attorneys for Defendant-Respondent.

90

REMITTITUR.

Order of Appellate Term. 91

At an Appellate Term of the Supreme Court, First Judicial Department, held at the County Court House, Borough of Manhattan, City of New York, on the 26th day of June, 1928.

Present—HON. NATHAN BIJUR,
" " AARON J. LEVY,
" " THOMAS C. T. CRAIN, Dissents,
Justices.

Order of Reversal on Appeal from the City Court. 92
June, #13.

[SAME TITLE.]

The above named plaintiff in this action having appealed to the Appellate Term of the Supreme Court, First Judicial Department, from a judgment of the City Court of the City of New York, County of New York, entered in the office of the Clerk of said Court on the 18th day of October, 1927, and the said appeal having been heard and due deliberation having been had thereon, 93

IT IS HEREBY ORDERED AND ADJUDGED, that the judgment so appealed from be and the same is hereby reversed with costs and judgment directed in favor of the plaintiff for the amount claimed in the complaint.

Enter,

N. B.,
Justice Supreme Court
Sitting in Appellate
Term.

A copy.
(Seal)

WILLIAM T. COLLINS,
Clerk.

Affidavit of No Opinion.

94

State of New York,
County of New York—ss.:

RALPH L. KNISLEY, being duly sworn, deposes and says that he is an attorney at law and managing clerk for Laughlin, Gerard, Bowers & Halpin, attorneys for defendant-appellant; that no written opinion or memorandum was handed down by any Justice of the City Court of the City of New York in connection with the judgment and order appealed from.

95

RALPH L. KNISLEY.

Sworn to before me this
24th day of October, 1928.

PATRICK H. SULLIVAN,
Notary Public.
N. Y. Co. Clk's No. 474, Reg. No. 0-47.
Kings Co. Clk's No. 266, Reg. No. 111.
Bronx Co. Clk's No. 53, Reg. No. 3087A.
Commission expires March 30, 1930.

96

Stipulation Waiving Certification of Record to Court of Appeals.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the foregoing are true and correct copies of the Notice of Appeal to the Court of Appeals; the remittitur from the Appellate Term, First Department, to the City Court of the City of New York; the Order and Judgment of the City Court of the City of New York, County of New York, entered upon the said remittitur; all of which are now on file with the Clerk of the City Court of the City of New York, County of New York. Certification thereof hereby is waived.

Dated, New York, November , 1928.

LAUGHLIN, GERARD, BOWERS & HALPIN,
Attorneys for the Defendant-Appellant.

GEORGE P. NICHOLSON,
Attorney for the Plaintiff-Respondent.

Certificate of Clerk.

100

State of New York,
County of New York,
City of New York—ss.:

I, HARRY C. PERRY, Clerk of the City Court of the City of New York in and for the County of New York, do hereby certify that the foregoing consists of certified copies of the notice of appeal to the Court of Appeals, the remittitur from the Appellate Term, First Department to the City Court of the City of New York, the order and judgment of the City Court of the City of New
101 York, County of New York, entered upon the said remittitur, all of which are now on file in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, this day of November, 1928.

HARRY C. PERRY,
Clerk of the City Court of the City of New York.

(Seal)

102

COURT OF APPEALS

OF THE STATE OF NEW YORK.

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,

Plaintiff-Respondent,

—against—

THE CORN EXCHANGE BANK,

Defendant-Appellant.

SUPPLEMENT TO PAPERS ON APPEAL

FROM JUDGMENT AND ORDER OF CITY COURT OF CITY OF NEW YORK, COUNTY OF NEW YORK.

LAUGHLIN, GERARD, BOWERS & HALPIN,
Attorneys for Defendant-Appellant,
No. 57 William Street,
New York City.

HON. GEORGE P. NICHOLSON,
Corporation Counsel,
Attorney for Plaintiff-Respondent,
Municipal Building,
New York City.

New York Supreme Court.

APPELLATE ~~DIVISION~~ TERM—FIRST DEPARTMENT. 1

Present—HON. NATHAN BIJUR,
" AARON J. LEVY,
" THOMAS C. T. CRAIN,
Justices.

#13 CC

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,
Plaintiff-Appellant,

—against— 2

CORN EXCHANGE BANK,
Defendant-Respondent.

Opinion of Appellate Term.

June, 1928.

Appeal by plaintiff from judgment of the City Court, County of New York, dismissing the complaint.

3

GEORGE P. NICHOLSON, Corporation Counsel (Joseph I. Berry, Martin H. Murphy and William E. Fay, of counsel), for appellant.

LAUGHLIN, GERARD, BOWERS & HALPIN (Henry M. Carpenter, of counsel), for respondent.

BIJUR, J.:

This action was instituted by plaintiff in conformity with a suggestion contained in an un-

reported decision of Mr. Justice O'Gorman, Law Journal, January 22, 1904, to make effective the provisions of Sections 921, 922 and 923 of the Code of Criminal Procedure, which so far as material read as follows:

"Sect. 921. Parents leaving their children chargeable to the public, how proceed against.

a. When the father, or the mother, absconds from the children, or a husband from his wife, or a wife from her husband, leaving any of them chargeable or likely to become chargeable upon the public, the officers mentioned in section nine hundred and fourteen may apply to any two justices of the peace or police justices in the county in which any real or personal property of the father, mother, husband or wife is situated, for a warrant to seize the same. Upon due proof of the facts, the magistrate must issue his warrant, authorizing the officers so applying to take and seize the property of the person so absconding."

b. * * *

"Sect. 922. Seizure of their property; transfer thereof, when void.

The officers so applying may seize and take the property, wherever it may be found in the same county; and are vested with all the rights and title thereto which the person absconding then had. The sale or transfer of any personal property, left in the county from which he absconded, made after the issuing of the warrant,

whether in payment of an antecedent debt or for a new consideration, is absolutely void. The officers must immediately make an inventory of the property seized by them, and return it, together with their proceedings, to the next county court of the county where they reside, there to be filed."

"Sect. 923. Warrant and seizure, when confirmed or discharged; direction of the Court thereon.

The Court, upon inquiring into the circumstances of the case, may confirm or discharge the warrant and seizure; and if it be confirmed, must, from time to time, direct what part of the personal property must be sold, and how much of the proceeds of the sale, and of the rents and profits of the real property, if any, are to be applied toward the maintenance of the children or spouse of the person absconding."

The chief point urged by the respondent is that the statute is unconstitutional because it deprives the absconding party of his property without due process of law, namely without notice, actual or constructive, and is therefore, violative of Section 6 of Article I of the Constitution of this State and of the Fourteenth Amendment of the Federal Constitution.

The complaint recites that one Stefano had absconded leaving his wife and infant child in danger of becoming public charges; that a warrant of seizure was issued on or about September 21, 1923, by two City Magistrates, directing plaintiff to seize all the right, title and interest of the

absconder to the sum of $2,030 deposited to his credit with the defendant; that the warrant was
10 served on or about September 22, 1926, upon the defendant which had refused to honor it, whereupon judgment for the amount of the deposit was sought.

The history of these statutes dates back to an act of Parliament (5 George I, Chapter 8—1719) applicable to these colonies. It was re-enacted in substantially the same form by The Colonial Legislature on March 8, 1773. The State Legislature passed the equivalent statute on April 17, 1784, and again as Chapter 62 of the Laws of 1788. It was repeated in the Revised Statutes,
11 Part 1, Chapter 20, Title I, Sections 8 to 11. It has been the subject of judicial approval in People ex rel., Read v. Overseers, etc., 23 Barb. 236 (1856); Downing v. Ruger, 21 Wend. 178 (1839), and is referred to in Goodman v. Alexander, 165 N. Y. 289 (1901). During this prolonged period no question concerning its constitutionality seems to have been raised.

Statutes of this character, ante-dating the adoption of any and all American constitutions or indeed the establishment of our Republic, but providing remedies or precedure in harmony with the requirements and limitations of the then ex-
12 isting common law, are not to be held unconstitutional merely because they do not conform to the interpretation of constitutional limitations as applied to legislation subsequently enacted (Murray's Lessee v. Hoboken Improvement Co., 18 How. 272; Hartado v. California, 110 U. S. 516; See also Biddles, Inc. v. Enright, 239 N. Y. 354 at 361). I find, however, in this legislation an element which may account for the fact that its possible unconstitutionality did not suggest itself

to our courts in the past, namely this, that it does not embody provisions covering private litigation, nor prescribe a practice for litigation in its ordinary sense at all. It may well be regarded as a regulation for the exercise of the police power of the State. This is intimated in Goodman v. Alexander, supra, where the Court of Appeals, per Parker, *J.*, describes as follows: 13

> "Section 921 of the Code of Criminal Procedure in substance provides that if a father, a widowed mother, or a mother living apart from her husband absconds, leaving children a charge on the public, his or her property is liable for the support of such children." 14

The very language of the statute referring to the absconding of the head of a family leaving his dependents "chargeable or likely to become chargeable upon the public" indicates that the legislature contemplated an emergency more critical from the human standpoint in many respects than fire, epidemic, flood and similar emergencies, with which the state is justified in dealing ministerially, not on the theory of eminent domain, where due compensation is the constitutional corrective, but on the doctrine of Salus rei-publicae suprema lex (Stone v. Mayor & Alderman, etc., 25 Wend. 157; American Print Works v. Lawrence, 23 N. J. L. (3 Zab.) 590, 607; 21 N. J. Law (1 Zab.) 248, and cases there cited). It seems also that it would not be justifiable to declare this act essentially unconstitutional for failure to provide notice to the absconder, because the provision for seizure is a preliminary step to enforce the state's hold upon property within its jurisdiction (Matthews v. Matthews, 240 N. Y. 28; 15

Miller v. Lautenberg, 239 N. Y. 132) and it may well be assumed that when the matter comes on
16 to be heard before the County Court the latter will follow the suggestion of the Supreme Court of the United States in Guthrie National Bank v. Guthrie, 173 U. S. 528 at 539:

> "Although the act makes no provision for notice to the parties interested as to the time or manner in which the District Court will proceed to investigate the character of the claims, yet in the absence of any such provision the Court having the duty to investigate will have power to regulate the
17 time of the hearing and provide for reasonable notice by its rules, so as to prevent surprise."

Moreover, in a proceeding in rem or quasi in rem, particularly where the owner has absented himself from the jurisdiction, and the state is undertaking to perform his duties to his dependents and the public, I should be reluctant to hold that the bare formalism of publishing a notice in an obscure journal, or some similar futile expedient, would be required to instill legality into the proceeding. Surely the seizure of property
18 found within our jurisdiction is, in itself, a far more promising and efficient form of notice. See Miller v. Lautenberg (supra), at 137, and Pennoyer v. Negg, 95 U. S. 714.

These considerations lead naturally also to the question whether the present defendant in this proceeding which has for its purpose the mere seizure of the depositor's account, has such an interest in the statute governing the further proceedings as under familiar principles would entitle it to raise the question of the constitutional-

ity of the entire enactment (In re Keen, 194 N. Y. 281; see Shaw v. Board of Drainage, 160 Ky. 422 at 432; Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50). The further point made by the respondent in connection with the unconstitutionality of the act, that the "vesting" in plaintiff of title upon seizure is in itself unconstitutional, is answered adversely by the provision that upon the trial, the Court "may confirm or discharge the warrant and seizure"—in other words, the seizure is a mere preliminary remedy. Respondent's objection that the depositor is a necessary party to this action, manifestly falls, if the reasoning as to the constitutionality of the act be correct.

Judgment reversed, with costs, and judgment directed in favor of the plaintiff for the amount claimed in the complaint.

Bijur and Levy, *J.J.*, concur.

Crain, *J.* (dissenting): I dissent on the ground that the statute (Secs. 921, 922, 923, 924 and 925 of the Code of Criminal Procedure) authorizes the seizure of tangible property only and confers no power to attach or otherwise collect a debt. The defendant was not possessed of any property of Raffaele De Stefano. The relation between it and De Stefano was merely that of debtor and creditor. The judgment dismissing the complaint should be affirmed, with costs.

Filed.

[fol. 47] Reporter's certificate to opinion of Court of Appeals omitted in printing.

Judge's certificate to reporter and clerk omitted in printing.

[fol. 48] In Court of Appeals of New York

Bird S. Coler, Commissioner of Public Welfare of the City of New York, Respondent,

v.

The Corn Exchange Bank, Appellant

(Decided December 31, 1928)

Appeal from a final judgment of the City Court of the City of New York, in favor of the plaintiff, such appeal being taken directly to this court under Constitution, article VI, section 7 (3), and Civil Practice Act, section 588, subdivision 3, on the ground that only a constitutional question is involved therein.

Frank C. Laughlin for appellant.
Martin H. Murphy for respondent.

Opinion

Cardozo, Ch. J.:

Plaintiff, the Commissioner of Public Welfare, made complaint to the Domestic Relations Court that Raffaele De Stefano had abandoned his wife and infant child while residing with them in the city of New York, and had absconded from the State leaving wife and child without means, and likely, unless relieved, to become charges on the public purse.

A warrant was signed and issued by two magistrates of the court, upon a supporting affidavit by the wife, authorizing the Commissioner of Public Welfare to take and seize all the right, title and interest of the absconding husband in a fund deposited to his credit with the defendant, the Corn Exchange Bank, and upon such seizure to make an

inventory of the property taken and to make return of the proceedings with the warrant to the County Court for Bronx county.

Plaintiff has brought this action against the bank to reduce the fund to his possession with appropriate allegations that payment was refused after due demand and service. The defendant has moved for judgment upon the ground that the statute, the basis of the warrant, is a denial of "due process" under the Constitution of the State and Nation (N. Y. Constitution, art. I, §6; U. S. Constitution, amendment XIV). Judgment for the defendant was reversed by the Appellate Term of the Supreme Court (Coler v. Corn Exchange Bank, 132 Misc. Rep. 449), and thereafter final judgment in favor of the plaintiff was rendered by the City Court. The appeal taken directly from that judgment is within the jurisdiction of this court, a constitutional question, and no other, being involved therein (American Historical Society v. Glenn, 248 N. Y. 445, 448.)

The warrant of seizure was issued under Code Criminal Procedure, §§921, 922, 923, 924, 925. These sections provide in substance that the Commissioner of Public Welfare may apply to two magistrates for a warrant to seize the property of an absconding husband or father leaving wife or child likely to become charges on the public; that upon due proof of the facts, the warrant may be issued; that the officer receiving it may seize the property wherever found [fol. 49] within his county, and shall be vested with all the rights and title thereto which the person absconding then had; that return of all proceedings under the warrant shall be made to the next term of the County Court; that thereupon that court, upon inquiring into the circumstances of the case, may confirm or discharge the warrant and seizure; that in the event of confirmation the court shall from time to time direct what part of the property shall be sold, and how the proceeds shall be applied to the maintenance of spouse or children; and on the other hand that if the party against whom the warrant has issued shall return and support the spouse or children so abandoned, or give satisfactory security for such support, then the warrant shall be discharged, and the property restored.

The procedure thus authorized has its roots in a distant past.

In 1718 the Parliament of England enacted a statute which recites a like evil and prescribes a like remedy (5 Geo. I, ch. 8). The recital is that:

"Divers persons run or go away from their places of abode into other counties or places, and sometimes out of the kingdom, some men leaving their wives, a child, or children, and some mothers run or go away, leaving a child or children, upon the charge of the parish or place where such child or children was or were born, or last legally settled, although such persons have some estates, which should ease the parish of their charge, in whole or in part."

Whereupon the enacting clause provides:

"That it shall and may be lawful for the churchwardens or overseers of the poor of such parish or place where any such wife, or child, or children, shall be so left, upon application to, and by warrant or order from any two justices of the peace, to take and seize so much of the goods and chattels, and receive so much of the annual rents and profits of the lands and tenements of such husband, father, or mother, as such two justices of the peace as aforesaid shall order and direct, for or towards the discharge of the parish or place where such wife, child, or children are left, for the bringing up and providing for such wife, child, or children; which warrant or order being confirmed at the next quarter sessions, it shall be lawful for the justices of such quarter sessions to make an order for the churchwardens or overseers for the poor to such parish or place to dispose of such goods and chattels by sale, or otherwise, or so much of them, for the purposes aforesaid, as the court shall think fit, and to receive the rents and profits, or so much of them, as shall be ordered by the sessions, as aforesaid, of his or her lands and tenements, for the purposes aforesaid." (See also, 22 Halsbury, Laws of England, §1209.)

The Statute of George I was enacted in substantially the same form on March 8, 1773, by the Colonial Legislature of [fol. 50] New York. After the separation from England, the State Legislature placed a like act upon the statute books of the State, first in 1784 (Act of Apr. 17, 1784) and again in 1788 (L. 1788, ch. 62). From there, the act passed into the Revised Laws of 1813 (Act of Apr. 8, 1813;

R. L. chap. 78, § 22), and thence in 1829 into the Revised Statutes (1 R. S. ch. 20, title 1, §§ 8 and 9), where the subject of the seizure was broadened to include things in action generally as well as rents and goods and chattels. The Code of Criminal Procedure has carried down the statute to our own day unchanged in point of substance. During all this long history there has been, so far as the published records show, no challenge of its binding force, though the enforcement of its remedies has been part of the routine of the criminal courts. Judges, as well as administrative officers, have taken its validity for granted (People ex rel. Read v. Overseers of Poor, 23 Barb. 236; Downing v. Rugar, 21 Wend. 178; Goodman v. Alexander, 165 N. Y. 289, 291).

Not lightly vacated is the verdict of quiescent years (Ownbey v. Morgan, 256 U. S. 94, 108, 109; Otis Co. v. Ludlow Mfg. Co., 201 U. S. 140, 154; Biddles, Inc. v. Enright, 239 N. Y. 354, 361).

"The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it" (Jackman v. Rosenbaum Co., 260 U. S. 22, 31).

This background of tradition gives the setting of the statute and the method of approach when today its validity is challenged.

Much is made of the analogy between seizure under the statute and seizure under an attachment or other provisional remedy. We agree with the appellant that the analogy is only partial and imperfect. There, the property, though taken into the custody of the law, is held until an opportunity is given to a defendant, after suitable monition, to offer his defense (Windsor v. McVeigh, 93 U. S. 274, 279; Coe v. Armour Fertilizer Works, 237 U. S. 413, 425; Grannis v. Ordean, 234 U. S. 385, 393; Pennington v. F. N. Bank, 243 U. S. 269; Security Sav. Bank v. California, 263 U. S. 282, 287). Here the officer makes return of his proceedings to the County Court which inquires into the merits, and confirms or annuls the seizure without further

warning of its action to the putative absconder (People ex rel. Read v. Downing, supra). No doubt there are times, as under the Trading with the Enemy Act (40 Stat. 411, ch. 106; 40 Stat. 1020, ch. 201, § 7-c), when a conserving custody is permissible as the result of seizure without notice (Miller v. Lautenburg, 239 N. Y. 132; Central Union Trust Co. v. Garvan, 254 U. S. 554, 568; Comm. Trust Co. of N. J. v. Miller, 262 U. S. 51). A custodian is then in [fol. 51] the position of a common-law receiver. The disposition of the property is postponed for a term prescribed by law, and thereafter rights and remedies are transferred to the proceeds as a substituted fund. This statute does something more. It seizes and then distributes at the ensuing term of court.

We think the act is valid as a regulation of the family relation binding upon residents. A system of community property exists in many States (Arnett v. Reade, 220 U. S. 311). The Legislature of New York may say, if it will, that as an incident of marriage or parenthood a like system shall apply to any property of spouse or parent acquired in the future (Seeber v. Randall, 102 Fed. Rep. 215, 217; Sandoval v. Priest, 210 Fed. Rep. 814; Nott v. Nott, 111 La Ann. 1028; Kerr v. Urie, 86 Md. 72; Long v. Hess, 154 Ill. 482; Baker's Executors v. Kilgore, 145 U. S. 487). By the statute in question, it has done something less, but something measurably akin. What is vaguely known as the police power, however indefinite its faculties, must have competence at least for this. The statute was in force long before the absconding husband made his deposit in the defendant bank, and long before his marriage. He knew, or must be assumed to have known, when he took up his abode within the State, that under the supervision of the law his property would be applied, without notice, to the discharge of his duty, the support of wife and child, if he left them destitute behind him. This was as much an incident to the family relation as dower or curtesy or any other marital right. A system of common ownership, a form of statutory assignment, was established for abandoned dependents to the extent of their necessities. Proof before the warrant with confirmatory proof thereafter, reduces to a minimum the risk of error or oppression. Whatever risk remains must be charged to the relation with

its responsibilities and duties. The law does not stand upon punctilios if there is a starving wife at home. It "does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall" (Ownbey v. Morgan, supra). It keeps its exactions within the bounds of long inherited traditions (cf. Murray's Lessee v. Hoboken L. & I. Co., 18 How. [U. S.] 272, 278). The absconder counts the cost when he selects a domicile within the State. Submission is then an incident to parenthood and marriage.

In holding that the act is valid as a regulation by the Legislature of the family relation, we assume that the owner, the victim of the seizure, is in truth a husband or a parent, his matrimonial domicile here and not abroad. Jurisdiction is, of course, dependent upon the existence of the relation which the statute seeks to regulate. In the absence of that relation, the warrant and any proceedings [fol. 52] under it may be disregarded as a nullity (Thompson v. Whitman, 18 Wall. 457). We do not read the statute as prescribing anything to the contrary. If it were open to a different reading, it would be void to that extent. The owner may come forward at any time and reclaim the fund from any one on the ground that in truth he was neither spouse nor parent, though charged as such in the petition. Neither the provisional warrant of the magistrates nor the confirmatory judgment later will then be evidence against him. Not improbably he may come forward at any time and contest the charge that he absconded, though admitting parenthood and marriage. We leave that question open. If he is within the jurisdiction, he will learn promptly of the seizure, and being present or nearby will presumably defend when defense there ought to be. If he chooses to leave the jurisdiction, the Legislature may say, in view of its control of the marital relation, that he must take the chance of an appropriation of his property for the support of his dependents (cf. Ownbey v. Morgan, supra, at p. 111). This case does not require us to hold, however, that he will even then be bound unless in truth he has absconded. Here we have neither proof nor claim that the jurisdictional relation, however broadly interpreted, was lacking at the time of seizure. Raffaele DeStefano is not

here, denying that he is an absconding husband. The bank, claiming through and under him, is not here with a denial. It admits the jurisdictional relation, for the complaint, explicit in averment upon that head, is untraversed by an answer. No doubt, the bank's admission does not bind its depositor, but its plight in that regard is no worse than that of many a stakeholder harassed by conflicting claims and forced to choose between them (Scheffer v. Erie Co. Sav. Bank, 229 N. Y. 50, 53; Newhall v. Longacre Bank, 248 N. Y. 252, 254). The statute, if valid as to spouse or parent, is valid also as to another defending in his right. The bank has the same defenses that are open to its depositor, or so we shall assume, but surely it can have no greater ones. Confronted by the claim of a statutory assignee, it must ascertain the facts and wage the contest as it can (Newhall v. Longacre Bank., supra). If it fails to learn the truth, the chance of double payment is a common risk of life (Scheffer v. Erie Co. Sav. Bank, supra).

The case in brief is this: the statute, though it dispense with notice, is valid and effective as against an absconding spouse or parent. The victim of the seizure may nullify the whole proceeding, including any adjudication attempted in his absence, if there is lacking the jurisdictional relation which is the basis of his duty. He is then in the position of a non-resident who upon a false statement of his dwelling place has been subjected to a judgment after substituted service valid only as to residents (Cont. N. Bank v. Thurber, 74 Hun. 632; 143 N. Y. 648; McDonald v. Mabee, 243 U. S. 90; cf. Miedreich v. Launestein, 232 U. S. 236), [fol. 53] or in the position of a taxpayer whose chattels have been subjected to distress upon a false averment by a taxing officer that his taxes are unpaid (Murray's Lessee v. Hoboken Land & Improvement Co., supra), or in the position of an owner whose property has been seized under a wrongful exercise by a public officer of the power to abate a nuisance (People ex rel. Copcutt v. Board of Health, 140 N. Y. 1; Lawton v. Steele, 152 U. S. 133; Samuels v. McCurdy, 267 U. S. 188, 200), or of one whose bank deposit has been paid to the holders of letters testamentary issued by a Surrogate's Court upon proof of his death, though in truth he was alive (Scott v. McNeal, 154 U. S. 34; cf. Cunnius v. Reading School District, 198 U. S. 458),

or of one injured in person or property by an administrative order (Public Clearing House v. Coyne, 194 U. S. 497). In these and like instances, the order is a nullity if there is lacking the fact upon which jurisdiction is dependent, yet valid and decisive otherwise. DeStefano will be unaffected by any adjudication made at any stage of these proceedings if the jurisdictional relation, the postulate behind the seizure, is found to be unreal. On the other hand, if the relation exists, he is not aggrieved by the seizure, nor has due process been denied him (Hatch v. Reardon, 204 U. S. 152, 160, 161; Hendrick v. State of Md., 235 U. S. 610). The bank, claiming under him, can gain no better right.

We have preferred to rest our judgment upon a ruling that, the jurisdictional relation being established or conceded, the property of an absconding spouse or parent may be applied without notice other than the seizure to the support of wife and child. We reach the same result, however, if we assume that notice is as necessary in such conditions as at the suit of any stranger. Seizure of the deposit at the instance of a public officer was warning to the owner that a proceeding had been begun (Windsor v. McVeigh, 93 U. S. 274, 279). If there was need of other warning to supply him with an opportunity for a hearing, it was given by the statute. The statute told him, a resident of the State, that the proceeding would come on for hearing at the next term of the County Court. This might be adequate notice or inadequate according to the circumstances (Roller v. Holly, 176 U. S. 398, 409; Goodrich v. Ferris, 214 U. S. 71). Under the law, the terms of County Courts are publicly appointed (Judiciary Law, § 192; Cons. Laws, ch. 30). If the term next appointed gave a reasonable opportunity to the owner to appear and defend, he is not aggrieved though in other circumstances the time might be too short. The burden is on the defendant to show that notice was inadequate.

The judgment should be affirmed with costs.

POUND, CRANE, ANDREWS, LEHMAN, KELLOGG and O'BRIEN, JJ., concur.

Judgment affirmed.

[fol. 54] IN COURT OF APPEALS OF NEW YORK

Petition for Appeal, Assignments of Error, and Prayer for Reversal

PETITION FOR APPEAL

Considering itself aggrieved by the final decision of the Court of Appeals of the State of New York, to-wit the order and judgment of said court made and entered on the 31st day of December, 1928 in a cause wherein the appellant herein was defendant and the appellee herein was plaintiff, brought in the City Court of the City of New York, County of New York, the appellant herein, The Corn Exchange Bank, hereby prays that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the bond thereon.

ASSIGNMENTS OF ERROR

And the said appellant, The Corn Exchange Bank, assigns the following errors in the record and proceedings in the said cause:

(1) That the Court of Appeals of the State of New York [fol. 55] by its affirmance of the judgment of the City Court of the City of New York entered pursuant to an order of reversal of the Appellate Term of the Supreme Court of the State of New York, First Department, which said judgment denied the appellant's motion to dismiss the complaint and granted judgment for the appellee, erred in that it did not dismiss the complaint on the ground that said complaint fails to state facts sufficient to constitute a cause of action by reason of the fact that any right of action therein is based upon Sections 921 and 922 of the Code of Criminal Procedure of the State of New York, referred to in the complaint, and that said sections are unconstitutional under the Constitution of the State of New York, and particularly the 14th amendment thereto, in that said sections by their terms, and as construed by the Court of Appeals, attempt to deprive persons, including the appellant, The Corn Exchange Bank, and its depositor, Raffaele De Stefano, men-

tioned in said complaint, and either or both of them, of property without due process of law.

(2) That the said Court of Appeals further erred in said affirmance of the denial of the appellant's motion, as aforesaid, in that it did not dismiss the complaint on the ground that the plaintiff in said action, the appellee herein, has no legal capacity to sue and has no title or interest in the fund referred to in the complaint, and the court in which said action was instituted has no jurisdiction of the subject of the action, because the plaintiff, the appellee herein, derived whatever capacity or interest he has or had from Sections 921 and 922 of the Code of Criminal Procedure of the State of New York, which said sections, as heretofore stated, are unconstitutional and in violation of the 14th amendment of the Constitution of the United States, in that said sections attemps to deprive said appellant, The Corn [fol. 56] Exchange Bank, and its depositor, Raffaele de Stefano, and either or both of them, of property without due process of law.

PRAYER FOR REVERSAL.

For which errors the appellant, The Corn Exchange Bank, prays that said order and judgment of the Court of Appeals of the State of New York, dated the 31st day of December, 1928, in the above entitled case be reversed, and a judgment rendered in favor of said appellant, The Corn Exchange Bank, and for costs.

Dated January 18, 1929.

Spotswood D. Bowers, Counsel for Appellant.

[fol. 57] IN COURT OF APPEALS OF NEW YORK

ORDER ALLOWING APPEAL

The appellant in the above entitled cause having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the order and judgment made and entered in the above entitled cause by the Court

of Appeals of the State of New York on the 31st day of December, 1928, and from each and every part thereof, and having presented and filed its petition for appeal, assignments of errors and prayer for reversal, pursuant to the statutes, and rules of the Supreme Court of the United States in such cases provided;

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Court of Appeals of the State of New York in the above entitled cause, as provided by law, and

It is further ordered that the Clerk of the City Court of the City of New York, County of New York, in the State of New York, shall prepare and certify a transcript of the record, proceedings and judgment in this case, and transmit same to the Supreme Court of the United States so that it shall have the same in said court within thirty (30) days [fols. 58 & 58½] of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of $500.00.

Dated January 18, 1929.

Benjamin N. Cardozo, Chief Judge of the Court of Appeals of the State of New York.

[fols. 59-67½] Bond on Appeal for $3,211.50 omitted in printing.

[fol. 68] In City Court of City of New York

[Title omitted]

Order on Remittitur—Jan. 14, 1929

The defendant in the above entitled action having appealed to the Court of Appeals from the judgment in the above-entitled action, in favor of the plaintiff and against the defendant, entered in the office of the Clerk of the City Court of the City of New York, New York County, on the 3d day of October, 1928, for the sum of $2,211.50, and also from an order in the above-entitled action made on the 3rd

day of August, 1928, and entered in the office of the Clerk of the City of Court of the City of New York, New York County, on the 3d day of August, 1928, making the order and judgment of the Appellate Term, First Department, the order and judgment of the City Court of the City of New York, New York County, which order of said Appellate Term, First Department, reversed the judgment dismissing the complaint herein, and directed judgment in favor of the plaintiff for the sum demanded in the complaint; and the said appeal having been duly argued at the said Court of Appeals, and the Court, in an order made and [fol. 69] entered therein the 31st day of December, 1928, ordered and adjudged that the judgment of the City Court of the City of New York appealed from herein be affirmed with costs, and having further ordered that the record therein and the proceedings in said Court be remitted to the said City Court of the City of New York, there to be proceeded upon according to law;

Now, upon reading and filing the said remittitur and on motion of George P. Nicholson, Corporation Counsel, attorney for plaintiff-respondent, it is

Ordered and adjudged that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

Enter.

H. L. S., J. C. C.

[fol. 70] In City Court of City of New York

Bird S. Coler, Commissioner of Public Welfare of the City of New York, Plaintiff-Respondent,

against

The Corn Exchange Bank, Defendant-Appellant

Judgment

The defendant in the above-entitled action having appealed to the Court of Appeals from the judgment in the above-entitled action, in favor of the plaintiff and against the defendant, entered in the office of the Clerk of the City Court of the City of New York, New York County, on the

3d day of October, 1928, for the sum of $2,211.50, and also from an order in the above-entitled action made on the 3rd day of August, 1928, and entered in the office of the Clerk of the City Court of the City of New York, New York County, on the 3rd day of August, 1928, making the order and judgment of the Appellate Term, First Department, the order and judgment of the City Court of the City of New York, New York County, which order of said Appellate Term, First Department, reversed the judgment, dismissing the complaint herein, and directed judgment in favor of the plaintiff for the sum demanded in the complaint; and the said appeal having been duly argued at the said Court of Appeals, and that Court in an order made and entered [fol. 71] therein the 31st day of December, 1928, ordered and adjudged that the judgment of the City Court of the City of New York appealed from herein be affirmed with costs, and an order having been duly entered in the office of the Clerk of the City Court of the City of New York, New York County, on the 14th day of January, 1929 making the order and judgment of the Court of Appeals the order and judgment of this court, and the costs of the plaintiff-respondent having been duly taxed at the sum of $170.66.

Now on motion of George P. Nicholson, Corporation Counsel, attorney for plaintiff-respondent, it is

Adjudged that the judgment of the City Court of the City of New York, New York County, appealed from herein be and the same hereby is affirmed, and it is further

Adjudged that the plaintiff-respondent Bird S. Coler, Commissioner of Public Welfare of the City of New York, recover of the defendant-appellant The Corn Exchange Bank, the sum of $170.66 the amount of said plaintiff-respondent's costs as taxed and that said plaintiff-respondent have execution therefor.

Dated New York, January 22, 1929.

Harry C. Perry, Clerk.

[fol. 72] IN COURT OF APPEALS OF NEW YORK

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed by and between the attorneys and counsel for the respective parties in the above-entitled cause that the printed record on appeal in the Court of Appeals of the State of New York, entitled "Papers on Appeal from Judgment and Order of the City Court of the City of New York, County of New York" and "Supplement to Papers on Appeal from Judgment and order of the City Court of the City of New York, County of New York"; the order of remittitur of the Court of Appeals of the State of New York dated December 31, 1928, attached to said record, and certificate of the Clerk of the Court of Appeals of the State of New York, attached thereto; the opinion of the Court of Appeals of the State of New York; the petition for appeal, assignments of error and prayer for reversal to the Supreme Court of the United States; the order allowing appeal to the Supreme Court of the United States; supersedeas bond, security for cost and [fol. 73] stay of execution; the order staying execution of judgment and the original citation and proof of service thereof, and the order of the City Court of the City of New York, New York County, dated January 14, 1929 and the judgment of the City Court of the City of New York, New York County, dated January 22, 1929, constitute all the record to be certified by the Clerk of the City Court of the City of New York and transmitted to the Supreme Court of the United States, and constitute all the papers necessary for consideration of the appeal herein.

Dated February 6, 1929.

Spotswood D. Bowers, Counsel for the Corn Exchange Bank, Appellant. George P. Nicholson, Counsel for Bird S. Coler, Commissioner of Public Welfare of the City of New York, Appellee.

[fols. 74-77½] Citation, in usual form, showing service on George P. Nicholson et al., omitted in printing.

[fols. 78-80] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 81] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Feb. 16, 1929

Comes now the appellant in the above-entitled cause and states that the points upon which it intends to rely in this Court in this case are as follows:

Point 1. The Court of Appeals of the State of New York erred in holding that Sections 921, 922, 923, 924, and 925 of the Code of Criminal Procedure of the State of New York, upon which sections alone the plaintiff's (appellee here) cause of action is concededly predicated, are not unconstitutional and not in violation of the 14th Amendment to the Constitution of the United Etates, and that said sections do not deprive or attempt to deprive appellant and its depositor, Raffaele De Stefano, either or both of them of property without due process of law, for the following reasons:

(a) Sections 921, 922, 923, 924 and 925 of the Code of Criminal Procedure of the State of New York do, by their express terms, and as construed by the Court of Appeals [fol. 82] deprive or attempt to deprive persons including the appellant and its depositor, Raffaele De Stefano, and either or both of them of property without due process of law; and

(b) Said sections of the Code of Criminal Procedure in violation of due process of law do attempt to authorize the seizure and administration and a divesting of title to property of appellant and its depositor, Raffaele De Stefano, without any notice to appellant or its depositor, Raffaele De Stefano, and without opportunity on the part of appellant or its depositor, Raffaele De Stefano, to be heard, and in that thereby appellant and its depositor, Raffaele De Stefano, and either or both of them, are deprived of their property and their property rights are thereby impaired without due process of law; and

(c) That appellant has a sufficient interest in the fund in question and has sufficient property rights therein to urge to this court the unconstitutionality of said sections as they affect the appellant and its depositor, Raffaele De Stefano.

And the Appellant further states that the parts of the record as filed in this court, which need to be printed by the Clerk for the hearing of the case, are the entire record, as so filed and numbered pages 1 to 80, with the exception of pages 65, 66 and 67 of said numbered pages which are entitled "Order Staying Execution of Judgment."

Spotswood D. Bowers, Counsel for Appellant.

[fol. 83] Supreme Court of the United States

Sir: Please take notice that the within is a true copy of the Appellant's Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed in the above-entitled cause.

Dated New York, February 7, 1929.

Yours, &c., Spotswood D. Bowers, Counsel for Appellant, 57 Williams Street, Borough of Manhattan, New York City.

To George P. Nicholson and J. Joseph Lilly, Esqs., Counsel for the Appellee, Municipal Building, Borough of Manhattan, New York City.

[fol. 84] Supreme Court of the United States.

United States of America,
Southern District of New York,
State of New York,
County of New York, ss:

James F. Twohy, being duly sworn, deposes and says that he is over the age of twenty-one (21) years and is an attorney and counselor at law, associated with Spotswood D. Bowers, counsel for the appellant in the above-entitled pro-

ceeding. That on the 14th day of February, 1929, between the hours of four o'clock P. M. and five o'clock P. M. he served the annexed statement of points and designation of the parts of the record to be printed on George P. Nicholson, Corporation Counsel of the City of New York, and counsel and attorney for Bird S. Coler, Commissioner of Public Welfare of the City of New York, appellee in the above-entitled cause, by delivering to and leaving with a [fol. 85] person of suitable age and discretion in charge of the office of said George P. Nicholson, to wit: the Chief Clerk thereof, in the Municipal Building, Borough of Manhattan, City, County and State of New York, a true and correct copy of the said statement of points and designation, the said George P. Nicholson being absent from his office at the time of such service; at the time of said service deponent received from the person to whom he delivered the copy of the annexed statement of points and designation, an admission of the service thereof upon the said George P. Nicholson, which said admission of service appears upon the back of the annexed statement of points and designation.

That on the 14th day of February, 1929, between the hours of four o'clock P. M. and five o'clock P. M. the deponent also served the annexed statement of points and designation upon J. Joseph Lilly, Assistant Corporation Counsel of the City of New York, and also counsel and attorney for Bird S. Coler, Commissioner of Public Welfare of the City of New York, appellee in the above-entitled action, by delivering to and leaving with a person of suitable age and discreition in charge of the office of said J. Joseph Lilly, Assistant Corporation Counsel of the City of New York, to wit: the Chief Clerk thereof, in the Municipal Building, Borough of Manhattan, City, County and State of New York, a true and correct copy of the said statement of points and designation, the said J. Joseph Lilly being absent from his office at the time of such service; at the time of said service deponent received from the person to whom he delivered the copy of the annexed statment of points and designation an admission of the [fols. 86 & 86½] service thereof upon the said J. Joseph

Lilly, which said admission of service appears upon the back of the annexed statement of points and designation.

James F. Twohy.

Sworn to before me this 15th day of February, 1929. Henry M. Carpenter, Notary Public. Queens Co. Cl'k's No. 270. Queens Register No. 460. N. Y. Co. Cl'k's No. 176. N. Y. Reg. No. O-162. Commission expires March 30, 1930. (Seal.)

[File endorsement omitted.]

Endorsed on cover: File No. 33,996. New York Court of Appeals. Term No. 687. The Corn Exchange Bank, appellant, vs. Bird S. Coler, Commissioner of Public Welfare of the City of New York. Filed February 9th, 1929. File No. 33,996.